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No. _____

IN THE

Supreme Court of the United States

HERBERT L. BENDOLPH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal courts of appeals are divided on the first question set forth below:

(1) May a district court *sua sponte* raise the statute of limitations in a *habeas corpus* proceeding notwithstanding the respondent's failure to raise that affirmative defense in its answer?

(2) Where there is undisputed evidence that someone other than the petitioner altered a court document in a way that would have misled the petitioner with respect to when he was required to file his *habeas* petition, was it error for the court of appeals to affirm the dismissal of his petition as untimely without remanding the case for an evidentiary hearing to consider if the limitations period should be equitably tolled?

LIST OF PARTIES

Petitioner Herbert L. Bendolph is a federal inmate. Respondent is the United States of America. As a result of the Third Circuit's consolidation of two cases for *en banc* argument and decision, Julio Otero was a party to the *en banc* proceeding. Mr. Otero, a federal inmate, is not seeking this Court's review.

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Petitioner Herbert L. Bendolph respectfully requests that a writ of *certiorari* issue to resolve a direct split among the federal courts of appeals on the principal issue in this petition, an issue that divided the *en banc* Third Circuit in this case.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Appendix A) is reported at *United States* v. *Bendolph,* 409 F.3d 155 (CA3 2005) (*en banc).* The opinion of the district court (Appendix B) is unreported but available at *United States* v. *Bendolph,* 2001 U.S. Dist. LEXIS 9032, 98-601-SLR (D. Del. Jan. 2, 2001).

JURISDICTION

The *en banc* court of appeals entered its judgment on May 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2255.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §§ 2255 and § 2244(d)(1) are excerpted in relevant part in Appendix C.

STATEMENT OF THE CASE

Factual Background

Petitioner Herbert L. Bendolph is a federal inmate, having been convicted by a jury in the District of Delaware of being a felon in possession of

a firearm.[1] Mr. Bendolph took an appeal to the Third Circuit, which affirmed by judgment order dated May 5, 1997.[2] The court of appeals entered a certified copy of its judgment in lieu of a formal mandate on May 27, 1997. That document noted that the judgment was entered on May 5, 1997, and that the certified copy of the judgment in lieu of a formal mandate was entered on May 27, 1997.

In his trial and his direct criminal appeals, Mr. Bendolph was represented by a federal public defender. On August 25, 1997, she filed on his behalf a petition for a writ of *certiorari*.[3] A copy of the court of appeals' certified judgment entry in lieu of a formal mandate filed with the *certiorari* petition appears to have the "5" in "May 5 1997" typed over such that the date of the judgment of the court of appeals appears to be "May 27 1997."[4]

This Court denied the petition on October 20, 1997. On October 18, 1998, less than a year after this Court denied his *certiorari* petition, Mr. Bendolph (by then acting *pro se)* filed a motion under Section 2255, 28 U.S.C. § 2255.[5]

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1 *United States* v. *Bendolph,* No. 01-2468 (CA3 2005), App. A at 6a.

2 *Id.*

3 *Id.*

4 *Id.* at 7a.

5 *Id.*

Proceedings Below

The district court conducted a preliminary review of Mr. Bendolph's Section-2255 motion as it was required to do under Rule 4 of the Rules Governing Section 2255 Proceedings in the United States District Courts.[6] After conducting that review, the district court directed the government to file an answer to the Section-2255 motion.[7]

The government filed its answer on December 17, 1998. It did not assert as an affirmative defense the statute of limitations in the Antiterrorism and Effective Death Penalty Act (the "AEDPA").[8]

More than 20 months later, the district court *sua sponte* entered an order raising the possibility that Mr. Bendolph's Section-2255 motion was untimely.[9] The district court reasoned that Mr. Bendolph had one year to file his Section-2255 motion from this Court's denial of a *timely* petition for a writ of *certiorari*.[10] The district court allowed both Mr. Bendolph and the government to address the possible application of the statute of limitations, both did and

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6 *Id.* at 7a.

7 *Id.*

8 *Id.* at 7a-8a.

9 *Id.* at 8a.

10 *Id.* at 8a-9a. The district court relied on the Third Circuit's opinion in *Kapral* v. *United States*, 166 F.3d 565, 575, 577 (CA3 1999).

the district court then dismissed Mr. Bendolph's motion as time-barred.[11]

Mr. Bendolph took an appeal. The Third Circuit entered a certificate of appealability, and it appointed the undersigned as *pro bono* counsel.[12]

In reviewing the files provided them by the Third Circuit and by the federal public defender, *pro bono* counsel discovered the altered date described above. On appeal from the denial of the Section-2255 motion, in addition to arguing that the district judge should not *sua sponte* have raised the timeliness issue, Mr. Bendolph argued that the date alteration provided a basis for equitable tolling of the AEDPA's statute of limitations. Mr. Bendolph argued that he and this Court were misled by the altered date such

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11 *Id.* at 8a.

12 The certificate of appealability included the following language:

> Petitioner's application for a certificate of appealability is granted as to the issues of: (1) whether the District Court may *sua sponte* raise the issue of whether Petitioner's § 2255 motion is barred by the statute of limitations and direct the parties to address the issue, where the government did not plead the statute of limitations as an affirmative defense; and (2) To the extent the District Court had authority to *sua sponte* raise the statute of limitations issue, whether Petitioner's § 2255 motion should be deemed timely in light of the Supreme Court having "filed" his petition for certiorari.

(citations omitted).

that he did not know he could not rely on the October 20, 1997, denial of *certiorari* as the trigger date for the one-year limitation for filing.[13]

A three-judge panel of the Third Circuit heard consolidated oral arguments in *Bendolph* and three other cases raising similar issues. Before the panel issued an opinion, the full Third Circuit reheard *Bendolph* with *United States* v. *Otero,* a case raising a similar issue.

The *en banc* court delivered its decision on May 16, 2005. Seven judges formed a majority that affirmed the dismissal of Mr. Bendolph's claim, while five judges dissented. One judge wrote an additional, shorter dissent in which four others joined.

The majority agreed with the decision of a three-judge panel of the Third Circuit in *Long* v. *Wilson*[14] (a Section 2254 case) that a district judge may *sua sponte* raise the AEDPA's statute of limitations.[15] While the *en banc* majority in this case held that the government may waive the AEDPA's statute of

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[13] Mr. Bendolph relied on the Third Circuit's authority in *Seitzinger* v. *Reading Hospital & Medical Center,* 165 F.3d 236, 240-41 (CA3 1999), which held that equitable tolling of statutes of limitations might be appropriate in "extraordinary circumstances." The Third Circuit has applied that reasoning in *habeas* cases. *See, e.g., Brown* v. *Shannon,* 322 F.3d 768, 771 (CA3 2003).

[14] 393 F.3d 390 (CA3 2004). There is a petition for a writ of *certiorari* pending in *Long* (No. 04-10035).

[15] App. A at 21a.

limitations, it held that, despite the government's waiver, the district court may nonetheless raise that affirmative defense on its own motion so long as the petitioner has notice and there is no prejudice to the petitioner from the government's failure to have raised the defense earlier.[16]

The majority conceded that comity and federalism, which played a substantial role in the analysis in *Long*, play no role in review of federal convictions and sentences under Section 2255.[17] Yet, despite the different policy concerns underlying Sections 2254 and 2255, the court decided that Sections 2254 and 2255 are indistinguishable for purposes of the *sua-sponte* invocation of the statute of limitations, and the majority made its holding applicable to *habeas* requests by both federal and state inmates.[18]

The majority concluded that Mr. Bendolph had notice and that he suffered no prejudice, and so it affirmed.[19] It mentioned the issue of the altered

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16 *Id.* at 28a. In *Long*, the Third Circuit held that, unless the petitioner could establish prejudice, a district judge could *sua sponte* dismiss the case as time-barred. 393 F.3d at 401. Notably, in *Long*, the Third Circuit drew the prejudice standard from the jurisprudence related to Fed. R. Civ. P. 15, despite the fact that the respondent in that case never sought leave to amend his answer.

17 App. A at 19a.

18 *Id.*

19 *Id.* at 33a-34a.

document but did not consider whether that fact warranted a remand to consider equitable tolling.[20]

The five judges in dissent began by asserting that the court should have remanded the case for a factual determination on the altered document/ equitable tolling issue.[21]

The dissenting judges then explained that the majority's holding ran counter to "the rule that generally it is not appropriate for a court to *sua sponte* raise non-jurisdictional defenses not raised by the parties" and that "[i]n an adversarial system, it is not for the courts to bring to light the best arguments for either side; that responsibility is left to the parties themselves."[22] In a similar sense, the dissent argued that it is typically unfair for the courts to act as "surrogate counsel for one side but not for the other."[23]

The dissenters pointed to this Court's decision in *Pliler* v. *Ford,* in which the Court in a somewhat different context made clear that calculating the AEDPA's statute of limitations is not for the district

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20 *Id.* at 6a-7a.

21 App. A at 37a. It is important to note that, while Mr. Bendolph was and this Court might have been misled by the document alteration, the government could not have been. It received its own copies of the relevant documents from the Third Circuit and, so, was on notice of the actual, relevant dates.

22 *Id.* at 41a-42a.

23 *Id.* at 43a.

courts but for counsel or the parties.[24] The author of the dissent wrote that the majority's determination

> also sends a disturbing message: We will aid the government in a habeas proceeding, but not the petitioner. The mistakes of the government may be excused and ignored, but any error by the petitioner is fatal – perhaps figuratively, but too often literally. The favored-party status the majority affords to the government in habeas cases undermines both the appearance and the fact of judicial neutrality, and I will have no part in it.[25]

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are now split on the principal issue presented in this case: whether a district court may *sua sponte* assert the AEDPA's statute of limitations when the *habeas* respondent has answered and not raised a timeliness defense. Two courts of appeals, including the Third Circuit in this case, now hold that the district judge may do so. Two courts of appeals hold that the district judge may not. This Court should step in to bring uniformity to the issue.

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24 124 S.Ct. 2441, 2446 (2004).

25 App. A at 51a-52a.

A. THE CIRCUITS ARE SPLIT ON THE QUESTION OF WHETHER A DISTRICT JUDGE HAS THE ABILITY *SUA SPONTE* TO RAISE THE AEDPA'S STATUTE OF LIMITATIONS AFTER THE RESPONDENT HAS FAILED TO DO SO.

Most of the federal courts of appeals have agreed that the AEDPA's statute of limitations is non-jurisdictional and therefore waivable,[26] but they disagree sharply about the effect of such a waiver.

In this case, a sharply divided *en banc* Third Circuit disagreed with the Sixth and Ninth Circuits and held that, in a *habeas* case governed by Section 2255 or Section 2254, a district court may raise and dispose of the motion or petition on the basis of the statute of limitations in the AEDPA notwithstanding the fact that the respondent did not raise that affirmative defense in its answer or at any time thereafter. The Third Circuit's determination was in error.

1. The Eleventh Circuit has adopted the same rule as has the Third Circuit.

Last year, the Eleventh Circuit reached a determination largely in accord with the Third

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[26] *See, e.g., Robinson* v. *Johnson*, 313 F.3d 128 (CA3 2002); *Acosta* v. *Artuz*, 221 F.3d 117, 122 (CA2 2000); *Hill* v. *Braxton*, 277 F.3d 701, 705 (CA4 2002); *Kiser* v. *Johnson*, 163 F.3d 326, 328 (CA5 1999); *Scott* v. *Collins*, 286 F.3d 923, 927 (CA6 2002), and *Nardi* v. *Stewart*, 354 F.3d 1134 (CA9 2004).

Circuit's decision in this case. In a *per curiam* opinion in *Day* v. *Crosby,*[27] a three-judge panel determined that Rule 4 of the Rules Governing *Habeas Corpus* Cases Under Section 2254 ("Rule 4") allows a district court *sua sponte* to dismiss a petition after the respondent filed his answer and did not raise the statute of limitations.[28] Mr. Day has filed a petition for a writ of *certiorari* (No. 04-1324), and it remains pending.[29]

2. The Sixth and Ninth Circuits have decided the issue in a way directly at odds with the holding of the Third Circuit in this case and the Eleventh Circuit in *Day*.

The holding of the Third Circuit in this case and of the Eleventh Circuit in *Day* are in direct conflict with the holdings of two other federal courts of appeals.

In *Scott* v. *Collins,*[30] the Sixth Circuit considered a case in which the state answered a Section-2254 petition but did not raise as an affirmative defense the AEDPA's statute of limitations. A federal magistrate

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27 391 F.3d 1192 (CA11 2004).

28 In an unpublished opinion, the First Circuit has likewise agreed that a district judge may raise the Section-2255 statute of limitations *sua sponte* after the United States has waived it. *Celikoski* v. *United States,* 21 Fed. Appx. 19 (CA1 2001).

29 The Court's docket suggests that the *Day* petition will be considered in the conference at the end of September 2005.

30 286 F.3d 923 (CA6 2002).

judge *sua sponte* raised the statute of limitations, gave the inmate an opportunity to argue against its application and then recommended denying the petition as untimely. The district judge agreed.

A divided panel of the Sixth Circuit reversed. The majority held that Rule 4 might allow a district court properly to raise the AEDPA's statute of limitations before it orders the respondent to respond to the petition. It relied on Rule 4's requirement that the district court conduct a preliminary review of the petition, dismiss it if it "plainly appears" that the petitioner is not entitled to relief, but otherwise require the respondent to file an answer or other response. The majority held, however, that the district court's ability *sua sponte* to raise the statute of limitations "expires" once the respondent files an answer or other response and waives the statute-of-limitations defense. The majority reversed the dismissal and explained that "[a] district court's ability to dismiss a habeas petition *sua sponte* as an initial matter (after giving the petitioner notice and an adequate opportunity to be heard) does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense."[31]

The Ninth Circuit considered an almost identical situation last year, and it reached the same result. In *Nardi* v. *Stewart*,[32] an inmate filed a Section-

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31 286 F.3d at 930.

32 354 F.3d 1134 (CA9 2004).

2254 petition, the district court required the respondent to answer and the answer did not assert a timeliness defense. The district judge nonetheless raised the issue *sua sponte* and dismissed the petition. The Ninth Circuit reversed, holding that "[t]he district court lacked the authority to revive Respondent's affirmative defense."[33] The court expressly followed the Sixth Circuit's opinion in *Scott*.[34]

In its decision in this case, the Third Circuit expressly acknowledged the holdings of the Sixth and Ninth Circuits in *Collins* and *Nardi*, and it confirmed what it held just six months before in *Long*: that it disagrees with and will not follow those cases: "We rejected two decisions *contra*, *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002) and *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004)."[35]

A direct conflict between the courts of appeals is a compelling reason to grant *certiorari*. Simply stated, had this case arisen in either the Sixth or the Ninth Circuit, Mr. Bendolph would have prevailed on appeal.

In addition, the conflict is persistent and intolerable. The issue has recurred (in the past four years, the First, Third, Eleventh, Ninth and Sixth Circuits have considered it), and it is likely to recur

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33 354 F.3d at 1142.

34 *Id.*

35 App. A. at 16a.

again both in those circuits in which there is now binding authority and in those yet to consider the issue.[36] None of the courts of appeals that have considered the issue have retreated from their positions, and there is no reason to conclude they will.

This Court should grant the petition, establish a uniform rule of law and give guidance to those courts that have yet to confront the issue.

B. THIS CASE PRESENTS AN IMPORTANT ISSUE REGARDING JUDICIAL POWER, AND THIS CASE IS A PARTICULARLY APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THE ISSUE.

This Court long ago explained that "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." [37]

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[36] *See, e.g., Holden* v. *Mechling,* No. 03-2364, 2005 U.S. App. LEXIS 9487 (CA3 May 24, 2005); *Knecht* v. *Shannon,* No. 01-2330, 2005 U.S. App. LEXIS 9568 (CA3 May 25, 2005); *Gildon* v. *Bowen,* 384 F.3d 883 (CA7 2004); *Armstrong* v. *United States,* 107 Fed. Appx. 522 (CA6 2004); *Hill* v. *Braxton,* 277 F.3d 701 (CA4 2002); *Acosta* v. *Artuz,* 221 F.3d 117 (CA2 2000); *Kiser* v. *Johnson,* 163 F.3d 326 (CA5 1999); *McNary* v. *Dretke,* No. 3:05-CV-0519, 2005 U.S. Dist. LEXIS 10792 (N.D. Tex. June 2, 2005); *Brodeur* v. *Patrick,* No. 03-6092, 2005 U.S. Dist. LEXIS 8731 (E.D. Pa. May 11, 2005); and *Hill* v. *Addison,* No. CIV-04-1728, 2005 U.S. Dist. LEXIS 9513 (W.D. Okla. April 27, 2005).

[37] *Ex parte Yerger,* 75 U.S. 85, 95; 8 Wall. 85, 95 (1869).

Congress' adoption of the AEDPA placed significant and unprecedented strictures on the availability of *habeas* relief. For the first time, there is now a statute of limitations. For the first time (outside of this Court's jurisprudence regarding abuse of the writ), there is a prohibition on successive petitions.

Because of the AEDPA's strict limitation on successive petitions, the application of the AEDPA's statute of limitations can and often does amount to a determination of whether an inmate will ever have a federal court hear the merits of a *habeas* petition. There is a crucial need, then, for the courts to balance Congress' intent in enacting the AEDPA with the centuries'-old importance of maintaining the availability of the writ of *habeas corpus*.

The Court has recognized that importance in a number of cases accepted for review in the past term and for the upcoming term, all of which dealt with application of the statute of limitations in *habeas* cases. *See, e.g., Pace* v. *DiGuglielmo*,[38] *Rhines* v. *Weber*,[39] *Mayle* v. *Felix*[40] and *Lamarque* v. *Chavis*.[41]

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[38] 125 S. Ct. 1807 (2005) (untimely state post-conviction petition is not "properly filed" under Section 2244(d)(2)).

[39] 125 S. Ct. 1528 (2005) (district court has discretion to stay a mixed *habeas* petition while inmate exhausts state remedies).

[40] No. 04-0563 (June 23, 2005) (amended *habeas* petition does not relate back so as to avoid the AEDPA's statute of limitations when it introduces new claims).

In the context of *habeas corpus,* the Court has held that "uniformity among federal courts is important on questions of this order . . . ."[42]

This case presents an issue of just as much importance. The Third Circuit has broadly decreed that there is almost no limit to a district court's ability to weigh in on the side of the respondent in a *habeas* proceeding to inject affirmative defenses the respondent itself should have raised (indeed, in a companion case to Mr. Bendolph's, *United States* v. *Otero,* which the Third Circuit resolved in the same opinion, the court held that the district court could raise the statute of limitations *sua sponte* even after the government answered, there was an evidentiary hearing and there was an appeal).[43]

This case presents a particularly strong vehicle for the Court to resolve the circuit split. The judgment of the Third Circuit ended Mr. Bendolph's hopes of obtaining *habeas* review, and there are no remaining proceedings. The statute of limitations was the only impediment to a merits review of Mr. Bendolph's *habeas* motion (because Mr. Bendolph presented a Section-2255 motion, there could be no

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41 No. 04-0721 (whether inmate "unreasonably delayed" filing state-court petition such that he was not entitled to tolling).

42 *Thompson* v. *Keohane,* 516 U.S. 99, 106 (1995) (granting *certiorari* to resolve conflict in *habeas* law among the courts of appeals).

43 App. A at 34a.

lingering issues of failure to exhaust or of procedural default). In addition, the opinions of the *en banc* Third Circuit provide thorough explications of the competing views on the principal issue in this petition.

C. AS THE DISSENT RECOGNIZED, THE THIRD CIRCUIT IS NOW "ON THE WRONG SIDE" OF THE SPLIT AMONG THE CIRCUITS.

The Third Circuit erred in holding that a district court could *sua sponte* raise the AEDPA's statute of limitations long after the government filed its answer and failed to assert that affirmative defense.

First, it is generally inappropriate for courts to raise non-jurisdictional affirmative defenses not raised by the parties themselves.[44] The reason is simple: ours is an adversarial system in which the parties themselves assert their claims and defenses and judges decide among competing arguments.[45]

Those courts that have held that district courts may raise the AEDPA's statute of limitations *sua*

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[44] *See Acosta* v. *Artuz*, 221 F.3d 117, 122 (CA2 2000).

[45] *See McNeil* v. *Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (describing difference between adversarial and inquisitorial systems of justice); *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

sponte have relied on comity, federalism and finality as their reasons.[46] However, Mr. Bendolph is a federal inmate who presented a Section-2255 motion. Comity and federalism have no role in a federal court's review of a federal trial and sentence. Even in Section-2254 cases, comity and federalism have no role in consideration of the statute of limitations. Those doctrines require respect for state courts, not a helping hand for state prosecutors.[47] In addition, the interest in finality is best met by having the parties' advocates promptly assert potential affirmative defenses rather than by waiting for months or years (as in this case) for the district judge to do so.[48]

Moreover, this Court has cautioned against judges abandoning their impartial roles to assist parties in calculating the *habeas* statute of limitations. In *Pliler* v. *Ford,*[49] the Court considered the Ninth Circuit's requirement that district courts give two "advisements" when presented with mixed *habeas*

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46 *See, e.g., Long,* 393 F.3d at 403.

47 *Duckworth* v. *Serrano,* 454 U.S. 1, 3 (1981) (comity and federalism allow state courts "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights.").

48 The application of waiver in the Federal Rules of Civil Procedure should apply with no less vigor to *habeas* matters since the Federal Rules of Civil Procedure apply to *habeas* cases unless they are inconsistent with the specific *habeas* rules. *See* Fed. R. Civ. P. 81; *Mayle* v. *Felix,* No. 04-563 at Typescript 7 and n.4 (June 23, 2005).

49 124 S. Ct. 2441 (2004).

petitions. The first was that "it would not have the power to consider [a prisoner's] motions to stay the [mixed] petitions unless he opted to amend them and dismiss the then-unexhausted claims."[50] The second was that that the inmate's "federal claims would be time-barred if he opted to dismiss the petitions 'without prejudice' and return to state court to exhaust all his claims."[51]

This Court vacated on both points:

> Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. *Requiring district courts to advise a pro se litigant in such a manner would undermine district judges' role as impartial decisionmakers*
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>
> The second advisement would force upon district judges the potentially burdensome, time-consuming, and fact-intensive task of making case-specific investigation and calculation of whether the AEDPA limitations period has

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50 *Id.* at 2445-46 (*citing Ford* v. *Hubbard*, 330 F.3d 1086, 1092-93 (CA9 2003)).

51 124 S.Ct. at 2446 (*citing* 330 F.3d at 1093).

> already run or will run by the time the petitioner returns to federal court.[52]

As the dissent in this case explained, it would be unfair and inconsistent to hold that the district court cannot assist a *pro se* inmate with calculating the statute of limitations but that the same judge could step in to assist the United States government with respect to the same issue:

> A habeas petitioner gets no help from the courts, and the government needs none either. If, as Justice Thomas explained in *Pliler,* calculating the statute of limitations is a job ordinarily reserved for trained counsel, then that job should be left in the able hands of the government's attorneys.[53]

The Third Circuit chose to side with the Eleventh Circuit and to disagree with the Sixth and the Ninth Circuits. In doing so, it not only perpetuated a circuit split, it erred.

This Court should grant this petition and resolve the split among the circuits. Moreover, should the Court determine to review *Day* v. *Crosby* or *Long* v. *Wilson,* it should also review this case because it presents the issue in the contexts of both Section 2254 (the statute at issue in *Day* and *Long*) and Section 2255 (which was not at issue in *Day* or *Long).*

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52 124 S. Ct. at 2446 (emphasis added).

53 App. A at 51a.

D. THE THIRD CIRCUIT'S REFUSAL TO ALLOW AN EVIDENTIARY HEARING ON EQUITABLE TOLLING HAS DEPRIVED MR. BENDOLPH OF HIS ONLY OPPORTUNITY FOR *HABEAS* REVIEW.

Every court of appeals to consider the question has held that, as a non-jurisdictional affirmative defense, the AEDPA's statute of limitations is subject to equitable tolling.[54] This Court has never squarely addressed the issue,[55] although several Justices have implicitly recognized the availability of equitable tolling.[56]

In this case, the majority and principal dissent agreed that there was an altered date in the certified copy of the Third Circuit's judgment attached to the *certiorari* petition filed with this Court during Mr.

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[54] *See, e.g., Miller* v. *New Jersey State Dep't of Corrections,* 145 F.3d 616, 617 (CA3 1998); *Calderon* v. *United States Dist. Court (Beeler),* 128 F.3d 1283, 1289 (CA9 1997), *overruled in part on other grounds, Calderon* v. *United States Dist. Court (Kelly),* 163 F.3d 530, 540 (CA9 1998) *(en banc); Dunlap* v. *United States,* 250 F.3d 1001, 1003 (CA6 2001); *Gibson* v. *Klinger,* 232 F.3d 799, 808 (CA10 2000); and *Harris* v. *Hutchinson,* 209 F.3d 325, 330 (CA4 2000).

[55] *Pace* v. *DiGuglielmo,* 125 S. Ct. 1807, 1811 n.8 (2005).

[56] *See Pliler* v. *Ford,* 124 S.Ct. 2441, 2448 (O'Connor, J., joined by Stevens, J., concurring) ("Nevertheless, if the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate.") and (Stevens, J., joined by Souter, J., concurring in the judgment) (". . . I am persuaded that the judgment entered by the Court – remanding to the Ninth Circuit to determine the propriety of equitable tolling – is both consistent with those views and correct.").

Bendolph's direct appeal from his criminal conviction.[57]

The likely effect of the altered document is plain. As Mr. Bendolph informed the district court, the federal public defender told him that she had filed a timely *certiorari* petition, and the copy of the Third Circuit's judgment filed with this Court wrongly suggested that was so. Mr. Bendolph diligently filed his Section-2255 motion less than a year after this Court denied *certiorari*. This was not just lawyer error, it was an affirmative misrepresentation.

Although it recognized the altered-document issue in its factual recitation, the majority of the Third Circuit ignored the issue in its analysis.

The dissenting judges asserted that the undisputed fact that the document was altered warranted a remand for an evidentiary hearing to determine who altered the document and what effect the alteration had on the timeliness of Mr. Bendolph's Section-2255 motion: "I believe it patently unfair of the majority to acknowledge the altered date and then simply affirm the District Court without permitting Bendolph the opportunity to show that he was misled into believing he had time to file his habeas petition."[58]

The courts of appeals that have addressed the issue have held that equitable tolling should be

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57 App. A at 6a-7a (majority) and App. 37-39 (dissent).

58 *Id.* at 39a.

applied when some extraordinary circumstance has prevented a petitioner from making a timely *habeas* filing and when the petitioner has shown diligence.[59]

In this case, the full Third Circuit recognized that something extraordinary occurred: someone other than Mr. Bendolph modified the date on a copy of a Third-Circuit order and submitted that altered document to this Court. That alteration likely caused Mr. Bendolph to miscalculate the date on which his Section-2255 motion – which he filed *pro se* – was due for filing in the district court. That likelihood is significant enough that the Third Circuit should have remanded the case for an evidentiary hearing to develop a factual record.[60] As it is, Mr. Bendolph has now been denied what will likely be his only opportunity for federal *habeas* review.

If it grants this petition with respect to the first issue, the Court should grant review of this issue to confirm that equitable tolling is available with respect to the AEDPA's statute of limitations and to direct the Third Circuit to remand for an evidentiary hearing in this case.

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[59] *See, e.g., Marsh* v. *Soares*, 223 F.3d 1217, 1220 (CA10 2000); *Calderon*, 128 F.3d at 1288-89; *Smith* v. *McGinnis*, 208 F.3d 13, 17 (CA2 2000) (*per curiam*); and *Jones* v. *Morton*, 195 F.3d 153, 159 (CA3 1999).

[60] *See Gonzales* v. *Crosby*, No. 04-6432 at Typescript 6 (June 23, 2005) (Stevens, J., dissenting) (clerical error that prejudiced petitioner was basis for remand); *see also, Valverde* v. *Stinson*, 224 F.3d 129 (CA2 2000) (remanding for hearing on equitable tolling).

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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